

USDOL/OALJ Reporter

[\*Rainey v. Wayne State University\*](#), 89-ERA-48 (ALJ Oct. 3, 1990)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036

Date Issued: OCT 3, 1990  
Case No. 89-ERA-48

John M. Rainey, Jr.  
Complainant

vs.

Wayne State University  
Respondent

Appearances:

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For Complainant

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Before: David A. Clarke, Jr.  
Administrative Law Judge

Recommended Decision And Order

The proceeding arises under the Energy Reorganization Act of 1974 (the Act), 42 U.S.C. § 5851, and the regulations found at 29 C.F.R. Part 24.

A hearing was held in Ann Arbor, Michigan on October 31 through November 2, 1989 and May 2, 1990. In addition to numerous exhibits submitted by the parties at the hearing, testimony was presented by, highly qualified, educated and

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articulate medical and administrative personnel.

Respondent's Motion For Dismissal on grounds that no evidence had been offered to suggest that Respondent engaged in any discriminatory activity whatsoever toward complainant and that Respondent was not the proper party defendant was denied on March 29, 1990. (Order Denying Respondents Motion for Dismissal, 3/29/90)

Post hearing briefs were submitted by the parties.

#### Contentions Of The Parties

Dr. Rainey contends that he was removed from Lafayette Clinic because he notified NRC of improprieties and violations in the handling of radioactive materials in the Clinic.

Wayne State University contends that it had nothing to do with Dr. Rainey's removal from the Clinic, that it had no control over the Director of the Clinic, Dr. G. Sarwer-Foner, and no proprietary interest in the Clinic; that Dr. Sarwer-Foner acted solely in his capacity as a employee of the Michigan State Department of Mental Health and as Director of Lafayette Clinic.

Wayne State also contends that Dr. Rainey was removed from the Clinic because of the turmoil he was creating in the Clinic and not because of complaints made to NRC and that such removal was justified under the circumstances.

#### Findings of Fact

Dr. John M. Rainey, Jr. M.D., Ph.D., Complainant, is a tenured Associate Professor in the Department of Psychiatry at Wayne State University, Respondent. He has been employed by Wayne State since July 1, 1974.(Tr.553, Dr. Rainey is a Board Certified psychiatrist.

Dr. Rainey's office was in Lafayette Clinic, where he held various jobs relating to psychiatric care, research and teaching. He occupied this office until July 20, 1989, when Dr. Sarwer-Foner, the newly appointed Director of Lafayette Clinic, asked Dr. Rainey, in writing, to vacate the premises.<sup>1</sup> Dr. Rainey left the Clinic that day.(Cl.Exh.11)

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At the time he left, Dr. Rainey was solely an employee of Wayne State and had no employment contract with Lafayette Clinic. It had expired in 1988. However, Dr. Rainey was engaged in a research project pursuant to a grant approved by Wayne State. He was conducting the research in the Clinic.

Dr. Rainey's relationship with many of his co-workers at the Clinic was strained.(T.621) Dr. R. Pohl wrote a memorandum to Dr. Rosenzweig on March 29, 1988, complaining that Dr. Rainey had taken five cabinet drawers of data from his office, without notice, surreptitiously, outside of normal business hours, to an undisclosed location, denying free access to the data by co-workers. Dr. Pohl wrote "[t]o take this data, sequester it and refuse free access to it is unethical and unprofessional<sup>2</sup> (Res.Exh.G)

On May 20, 1988, sixteen of Dr. Rainey's co-workers submitted a petition to Dr. Thomas Sullivan, Acting Director of the Clinic, requesting that Dr. Rainey be removed from his role in research administration because they no longer had confidence in him.(Res.Exh.H)

Dr. Rosenzweig, Acting Chairman of the Psychiatry Department at Wayne State and Dr. Rainey's immediate superior, responded to Dr. Rainey's August 1, 1988 memorandum on August 4, 1988, stating that he was:

\*\*\*\* concerned about the intensification of discord in the Lafayette Clinic and particularly among the researchers there and *your* major role in fomenting this discord. \*\*\* you had already created a significant amount of antagonism among the researchers toward yourself, which was reflected, in the *fact* of the petition.

\*\*\* It is obvious to me, however that you had no insight into the role that your own behavior had played in bringing about the writing of such a petition and the fact that your behavior had been self-destructive and that your further intentions would be even more so.

\*\*\* Your entire memorandum to me dated August 1 and especially your memorandum dated July 25 are acts of insolence, which any impartial person would realize to be the expression of a person indifferent to the consequences of his own actions upon his own well-being.(Res.Exh.II)

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On June 16, 1989, eighteen of Dr. Rainey's co-workers submitted a petition to Dr. Sarwer-Foner, Director of the Clinic, stating that" (w)e are concerned that in spite of Dr. Rainey's removal as Director of Research Administration, Dr. Rainey continues to exert a disruptive and destructive influence. Recent memoranda from Dr. Rainey, clearly threatening in tone, are an example. We ask that Dr. Rainey, for the common good, be removed from Lafayette Clinic." (Res.Exh.R)

On July 11, 1989, five of Dr. Rainey's co-workers wrote to Drs. Sarwer-Foner and Rosenzweig stating that:

Having received the attached and other similar memos we are writing to request assistance in pursuing legal action against Dr. John Rainey. These memoranda, which have been sent to no fewer than 23 persons, contain a great many slanderous statements which are potentially damaging to our reputations and to those of Lafayette Clinic and Wayne State University. We are disturbed by these widely- circulated false allegations and will pursue all possible legal methods to terminate them. We would be grateful for any legal assistance that could be provided by the State and/or the University towards this end. If this is not possible, we are willing to commit our personal funds in order to end this odious situation.(Res.Exh.V)

During this same time frame, early July, 1989, one or more staff members posted, on the second floor of the Clinic, copies of memoranda, an administrative law decision and curriculum vitae pertaining to Dr. Rainey. Included in the display was the sign "Komed Korner" with Dr. Rainey's picture in the center of the Os.(Cl.Exh.12)

Dr. Sarwer-Foner-described the atmosphere in the Clinic prior to Dr. Rainey's departure as "\*\*\* point, counterpoint' accusations, \*\*\* and raising hell about every bit of administrative material, \*\*\* I'm not talking just about radioactive substances, I'm talking about everything in the Clinic \*\*\*."(T.238) He stated that Dr. Rainey was reported to the extremely difficult and getting into all sorts of areas that did not concern him. Dr. Rainey wasted researchers time by sending memos to them for response.(T.319-321) He bad-mouthed the Clinic and infuriated co-workers.(T.245,246) He was difficult with the

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entire clinical staff and caused turmoil. Every researcher signed the petition asking that he be removed from the Clinic. (T.251-252) Moreover the represented a split-off administrative group which potentially could create administrative problems by failing to recognize lines of command within the Clinic, thereby presenting a challenge to Dr. Sarwer-Foner's authority as director.(T.250,267,288) An example was Dr. Rainey improperly signing leave slips for other employees.

Dr. Rosenzweig and Dr. Rainey did not interact on a cooperative basis. Dr. Rainey accused Dr. Rosenzweig of delaying requests for approval of an Upjohn research grant he was seeking. Dr. Rosenzweig accused Dr. Rainey of causing disturbances at the Clinic since before Dr. Rosenzweig became acting chairman and of being insubordinate from day one.(T.445,528) He described Dr. Rainey's failure to comply with requests for research information to be used in Wayne State's annual report and. Dr. Rainey's resistance to requests for information about the progress of his current research grant with NIMH, which Dr. Rosenzweig wanted to use in an attempt to dissuade Dr. Sarwer-Foner from removing Dr. Rainey from the Clinic. The grant information was eventually provided by Dr. Rainey, but only after another researcher at the Clinic, Dr. G. Dambach, intervened. Dr. Rainey submitted the information to Dr. Dambach, who forwarded it to Dr. Rosenzweig.

The turmoil to which doctor Sawyer-Foner referred was noted by personnel from the Nuclear Regulatory commission during an investigation at the Clinic in 1989. They wrote that "[t]he peer group relationship within the Lafayette Clinic and affiliated organizations appears to be unusually strained and adversarial." (Res.Exh.Q,p.8)

The turmoil in the Clinic stopped after Dr. Rainey's departure. He was relocated to offices in Harper Hospital (T.289,Res.Exh.EE)

Radiation Activity at the Clinic and Contacts  
With The Nuclear Regulatory Commission

Dr. Rainey complained in writing to the Nuclear Regulatory Commission (NRC) on September 26, 1988, November 9, 1988 and March 7, 1989.<sup>3</sup> (Res.Exh.Q;T.571) NRC personnel investigated the complaints on April 4 and 5, 1989 and found no violations of

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NRC requirements.(Res.Exh.Q) Dr. Rainey also sent a June 21, 1989 memo to NRC. This 14 page memo was addressed to Dr. Robert Levine and discussed Dr. Rainey's radiation concerns at the Clinic.(T.610;Cl.Exh.14) It was distributed to more than 20 other people, inside and outside the Clinic. Dr. Rainey wrote to NRC on April 14, 1989 alleging failure of the Clinic to carry out three of the four objectives in the report of March 15, 1989.(T.225) Dr. Rainey had 20 to 30 contacts with NRC after March 9, 1989.(T.636,637)

Dr. Sarwer-Foner was satisfied by the NRC report that no radiation violations existed at the Clinic, despite Dr. Rainey's insistence to the contrary.(T.286-267,299)

Dr. L. Hryhorczuk, a research chemist employed by Lafayette Clinic, was appointed the Clinic's radiation safety officer on March 21, 1988.(T.54) Dr. Rainey was Dr. Hryhorczuk's supervisor and was kept advised about radiation activities in the Clinic by Dr. Hryhorczuk.(T.59,103)

Mr. K.A. Warner, an employee of the Clinic and a member of the Clinic's radiation safety committee, worked with radioactive materials in the Biochemistry Department. As part of his duties, Mr. Warner was involved in overseeing the purchase and general inventory control of all radioisotopes coming into the Clinic, and their disposal.(T.142) He continued these activities until sometime in July through October, 1988, he is uncertain of the exact date, when the radiation safety committee was reconstituted. He remained a member of the new committee and has attended the two meetings held by the new committee.(T.143)

Dr. Rainey was Mr. Warner's supervisor. Mr. Warner does not deny that he discussed radiation concerns with Dr. Rainey, but stated that it was his duty to report such matters

to Dr. Hryhorczuk, who, of course, was keeping Dr. Rainey informed also.  
(T.145,146,171,621)

Mr. Warner spoke to NRC personnel during investigations at the Clinic and provided them with information.(T.156,192) No adverse actions have been taken against him by Dr. Sarwer-Foner and to his knowledge none have befallen Bob Arthur or Dr. Hryhorczuk, both of whom were involved in radiation activities at the Clinic with Dr. Rainey.(T.186,187,198)

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Dr. Sarwer-Foner conducted a staff meeting on June 6, 11089 to ask that all radiation concerns of the staff be presented to the Clinic's radiation safety officer. He did not instruct the staff not to go to NRC. In fact, there were postings in the Clinic advising personnel of their right to go to NRC.(T.158-160, 182-185)

Mr. Warner attended the meeting and recalls hearing the word "consequences" used by Dr. Sarwer-Foner, but cannot recall the context.(T.184) Nevertheless, he felt threatened by Dr. Sarwer-Foner's words. Dr. Sarwer-Foner denied making any threats to the staff. I accept Dr. Sarwer-Foner's version of what transpired at the meeting as being more credible. Mr. Warner was not certain about the words used during the meeting and was not certain that the context in which they were used was a threat.(T.280-283)

The letter asking Dr. Rainey to leave the Clinic was prepared by Dr. Sarwer-Foner on July 18, 1989, but due to the intervention of Dr. Rosenzweig was not delivered to Dr. Rainey until July 20, 1989.(T.370,444,445) Dr. Rainey and Dr. Sarwer-Foner met for the first time on July 20, 1989.(T.345,353)

#### Conclusions of Law

Lafayette Clinic is owned by the State of Michigan and is operated by the Michigan Department of Mental Health. Wayne State has no legal ownership rights to the Clinic. However, the Department of Mental Health, Wayne State and Lafayette Clinic are all instrumentalities of the State of Michigan. The statute creating the Clinic provided a tripartite mission as follows:

1. Conducting research regarding the incidence and treatment of mental illness.
2. The training of mental health professionals in all major disciplines.
3. The providing of clinical services to the citizens of Michigan on both an inpatient and outpatient basis.

To this end, the Department of Mental Health and Wayne State entered into agreements during December, 1986 and January, 1987 to establish a partnership for the purpose of supporting research of scientific merit.(Cl.Exhs.1,2 and Censoni deposition exhibit 5)

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The Clinic provides offices and working accommodations for both Clinic and Wayne State employees. Some of these employees are employed by both employers. Employees of the Clinic are supervised by employees of Wayne State and vice versa. Research is carried out separately and jointly within the Clinic. Until Dr. Sarwer-Foner's arrival as Director of the Clinic, the Director was also the Chairman of the Department of Psychiatry at Wayne State. Dr. Sarwer-Foner is not the Chairman of the Department of Psychiatry, but he is a tenured professor at Wayne State, for which he receives a substantial salary. Dr. Sarwer-Foner described the relationship between the Clinic and Wayne State as a marriage, in which both parties were collaborating together, intimately, to carry out the triple mission of the Clinic.(T.410)

While it can be successfully argued the Wayne State does not have a legal interest in the Clinic's physical facility, Wayne State and Lafayette Clinic are so closely entwined as to make them indistinguishable as to the management of the Clinic. They share in the decision making that affects the general management of the Clinic toward their common goals. They are engaged in a joint effort as set forth by the state legislature. The agreements and exhibits presented into evidence do not convincingly establish that Dr. Sarwer-Foner, Director of the Clinic, was in complete and total control of the use of space in the Clinic by Wayne State employees without influence from Wayne State staff.

Without belaboring the point, Respondent's motion to dismiss on this ground was denied. My rereading of the record convinces me that that decision was correct.

Therefore, if Respondent is to succeed he must do so on the basis of his second contention. Namely, that Dr. Rainey's removal from the Clinic was based on the turmoil he created and not because of complaints to NRC.

The statutory provisions of the Act offer protection to employees by prohibiting an employer from discharging or discriminating against an employee because the employee engaged in a protected activity. Specifically the Act provides in pertinent part:

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No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of the employment because the employee . . .

(1) Commenced, causes to be commenced . . . a proceeding under this chapter as the Atomic Energy Act of 1954 . . . ;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding . . .

42 U.S.C. § 5851.



The above activity is termed "protected activity." If an employee is fired or otherwise discriminated against as a result of engaging in such protected activity, the employee may, within thirty days after the alleged violation occurs, file a complaint with the Secretary of Labor which states the basis of said allegation.(42 U.S.C. § 5851(b))

In order for a complainant to prevail on a discrimination claim under the ERA, the complainant must prove (1) that the party charged with discrimination is an employer subject to the Act, (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding ....

*Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (CA. 9, 1984); *National Labor Relations Board v. Transportation Management Corp.*, U.S. , 103 S.Ct. 2469 (1983); *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (CA. 6, 1983). Once the employee shows that illegal motives played some role in the discharge, the burden shifts to the employer to prove that it would have discharged the complainant even if the protected activity had not occurred. *N.L.R.B. v. Transportation Management, Supra*.

An employer may discharge an employee who has engaged in protected activity provided the employer has reasonable grounds for the discharge and was not motivated by retaliatory animus

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*Lockert v. U.S. Department of Labor*, 867 F.2d 513, 519 (CA. 9, 1989); *Dunham v. Brock*, 794 F.2d 1037, 1040 (CA. 5, 1986)

The record indicates that Dr. Rainey first complained to NRC about perceived nuclear irregularities at the Clinic on September 26, 1988.(T.563) During the course of the next ten months, he contacted NRC with additional nuclear complaints pertaining to the Clinic. He also perceived a cover-up in progress by the co-workers he had identified as mishandling nuclear material. A cover-up in which attention would be diverted from them to him. (Cl.Exh.14) Dr. Rainey also requested co-workers to provide him with information about a narcotics investigation at the Clinic. (T.602) While denying any involvement with narcotics in the Clinic, he was concerned that he would be implicated in the investigation.

It is clear from this record that Dr. Rainey was not popular with his co-workers before and after making complaints to NRC. His lack of popularity appears to have been due to his own personality and the way in which he perceived himself, his co-workers and his responsibilities in the Clinic. Dr. Rainey appears to have engaged in constant harassment of co-workers by sending them numerous memoranda demanding information, answers to questions and accusing them of various improprieties and misdeeds.(T.447,448) He appears to have been involved in what could best be described as "a war of memos" with



his co-workers. He also resisted cooperation with his supervisor, Dr. Rosenzweig, and often communicated with Dr. Rosenzweig through other members of the faculty. Simple requests for information from Dr. Rosenzweig to Dr. Rainey about his research activities resulted in a flurry of unresponsive, evasive, and accusatory memos from Dr. Rainey. Likewise, Dr. Rosenzweig was not very responsive to or cooperative with Dr. Rainey.(T.561,562;C1.Exhs.30,31,33) Members of the staff even threatened legal action against Dr. Rainey for alleged slanderous statements in memos and they petitioned to have him removed from administration and then from the Clinic. Frankly, what was going on in the Clinic is surprising considering the educational level and occupational status of the participants. But, be that as it may, my concern is whether Dr. Rainey was removed from the Clinic as a result of his nuclear complaints.

Dr. Sarwer-Foner came on duty as Director of the Clinic in April, 1989. Within a few days, he was advised by his staff that

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the NRC investigation had been completed and that no violations of NRC rules had been found. He was satisfied at that point that the Clinic had no radiation problems.

Although he did not meet Dr. Rainey until the day of his departure from the Clinic, Dr. Sarwer-Foner knew of Dr. Rainey by reputation and knew that Dr. Rainey had filed complaints with NRC.(T.350) The record does not indicate when Dr. Sarwer-Foner first learned of Dr. Rainey's involvement with NRC. It suggests that while preparing to assume the duties of Director, Dr. Sarwer-Foner had been briefed about Dr. Rainey and his activities in the Clinic. Therefore, I infer that he knew of Dr. Rainey's nuclear activities before he became Director.

Dr. Sarwer-Foner discussed removing Dr. Rainey from the Clinic with Dr. Rosenzweig, who opposed his removal because of a possible negative impact on Dr. Rainey's research grants. (T.345,309,444,445) These discussions took place as early as June 2, 1989.(T.460) Despite Dr. Rosenzweig's efforts with Dr. Sarwer-Foner, Dr. Rainey delayed replying to Dr. Rosenzweig's request for information about his research grant progress, thereby preventing Dr. Rosenzweig's successful intervention. Dr. Rosenzweig learned of Dr. Rainey's complaints to NRC in February 1989.(T.505)

Dr. Sarwer-Foner testified that the problems with Dr. Rainey were the turmoil he created in the Clinic, the taking of another doctor's research data, agitating the staff, nuclear complaints, bad-mouthing the Clinic to outsiders, assuming responsibilities which were not his and causing some members of the staff to relate to him rather than to their supervisors. (T.308,316,320,321) He said that the final straw was Dr. Rainey's unauthorized newspaper advertisements soliciting patients for a project in the Clinic he had not approved.(T.351-352)

Dr. Rainey testified that he attempted unsuccessfully to stop the ads from running after notification from Dr. Sarwer-Foner's office. He alleged that co-workers conspired against him to continue the running of the ads, thereby making it appear that he had violated a directive from Dr. Sarwer-Foner. That may or may not be true and Dr. Rainey may have legal recourse against the alleged conspirators. However, it is not an issue for me to decide in this proceeding. What is significant is that from Dr. Sarwer-Foner's perspective, Dr. Rainey had ignored his directive

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to cancel the newspaper advertisements. There is no evidence that Dr. Sarwer-Foner had any knowledge of another person or persons continuing to run the ads.

Dr. Sarwer-Foner was the first witness to testify. The story of mayhem and turmoil in the Clinic that he told was difficult to believe. However, upon reviewing the testimony of other witnesses and the exhibits, I consider him to be credible. While there were a few discrepancies to be reconciled, I accept "he testimony of all of the witnesses as basically creditable.

Dr. Sarwer-Foner was quite emphatic when he testified that he had not removed Dr. Rainey from the Clinic because of his complaints to NRC.(T.250,251,286,287,376) He recognized these complaints as just one of the problems he had to deal with as Director of the Clinic.(T.308,316,320,321) In this regard, Dr. Sarwer-Foner appears to have put the nuclear complaints in perspective with the overall problems at the Clinic surrounding Dr. Rainey.

Dr. Sarwer-Foner did not object to the Clinic's staff reporting nuclear concerns to NRC. There were postings in the Clinic advising the staff of this right. However, he wanted such complaints to first be addressed to the Clinic's radiation safety officer.(T.367) He held a meeting and advised the staff of this procedure.

Dr. Rainey basically ignored the procedures by continuing to contact NRC. One of his most recent memos was dated June 21, 1989, consisting of 14 pages of nuclear concerns addressed to the Clinic's radiation safety officer and distributed to more than 20 people, including NRC and non-Clinic personnel.(Cl.Exh.14) Dr. Rainey attributes his removal from the Clinic to the issuance of this memo.(T.614) But, Dr. Sarwer-Foner had no reason to be concerned about nuclear violations in the Clinic because NRC had just finished an investigation of the Clinic and had found no violations. (T.250,286,287) Dr. Sarwer-Foner was not concerned with Dr. Rainey's nuclear activities except in so far as they contributed to the overall turmoil in the Clinic.(T.250) He ultimately removed Dr. Rainey because of the turmoil.(T.251) Since Dr. Rainey's June 21, 1989 memo was issued several months after Dr. Sarwer-Foner had been advised that there were no nuclear violations present in the Clinic, I accept his testimony that it played no part in his decision to remove Dr. Rainey. (T.376)

I recognize that a whistleblower often stands alone, unaided by friends or co-workers. But the mere filing of nuclear complaints with NRC can not surround the whistleblower with an invincible shield of job protection. All of the circumstances surrounding Dr. Rainey's removal must be considered. When they are, it appears that his removal was justified on the basis of the overall turmoil he created in the Clinic. His nuclear activities were only a small portion of that turmoil. Granted, the turmoil was contributed to by others in the Clinic and at Wayne State who were interacting with Dr. Rainey. But, his removal from the Clinic has ended the turmoil. Therefore, his removal appears justified on grounds other than nuclear activities.

Further evidence that Dr. Sarwer-Foner did not act with animus toward Dr. Rainey because of nuclear activities is demonstrated by the fact that Dr. Hryhorczyk and Mr. Warner, collaborators with Dr. Rainey in his nuclear activities, have not been treated adversely and do not contend that they have been treated adversely. Nor is there any evidence of an adverse action having been taken against Mr. Arthur.

I conclude that there was ample justification to remove Dr. Rainey from the Clinic and that Dr. Sarwer-Foner acted on the basis of the turmoil created by Dr. Rainey and his presence in the Clinic and not in retaliation for his nuclear activities.

#### RECOMMENDED ORDER

Accordingly, it is ORDERED that the Complaint be, and hereby is dismissed.

David A. Clarke, Jr.  
Administrative Law Judge

#### **[ENDNOTES]**

<sup>1</sup>Dr. Sarwer-Foner became Director of the Clinic in April, 1989.

<sup>2</sup>Dr. Rainey admitted taking the data from Dr. Pohl's office stating that he was a principal researcher and therefore, equally entitled to possession of the data.

<sup>3</sup>Dr. Rainey testified that he complained to NRC on September 26, 1988 and March or April, 1989.(T.563,571) Mr. Warner testified that it was Dr. Rainey's complaint that caused the NRC to investigate the Clinic.(T.155) NRC also reported telephone conversations with the alleged on February 27, and March 24, 1989.(Res.Exh.Q)